S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DIANE R. LONG, Plaintiff-Appellant,	UNPUBLISHED December 3, 2009
v WILLYS D. LONG, Defendant-Appellee.	No. 285963 Muskegon Circuit Court LC No. 06-033794-DO

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the May 20, 2008, amended judgment of divorce, challenging the trial court's determination that neither party was at fault for the breakdown of the marriage and the division of the marital property. We affirm.

Plaintiff first argues that the trial court clearly erred when it determined that neither party was at fault for the breakdown of the marriage because substantial evidence was presented at trial to prove that defendant's verbal abuse and controlling behavior were the cause of the divorce. As this Court has previously explained:

> In granting a divorce judgment, the trial court must make findings of fact and dispositional rulings. The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., if this Court is left with the definite and firm conviction that a mistake has been made. If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts. The trial court's dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that it was inequitable. [*Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005) (internal citations omitted).]

"Fault is a legitimate consideration in arriving at a property division in a divorce matter." *Burkey v Burkey*, 189 Mich App 72, 78; 471 NW2d 631 (1991). "This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). At trial, both parties introduced evidence to prove the other was at fault for the breakdown of the marriage. Plaintiff asserted that defendant was controlling and verbally abusive. She offered witness testimony to support her claim. Defendant denied these claims and provided rebuttal evidence. Defendant

contended that plaintiff was at fault for the breakdown of the marriage because she spent the parties' money excessively. While defendant may have been aware of plaintiff's spending habits before their marriage, plaintiff also testified to defendant's controlling behavior before the marriage when she testified that defendant forced her to sell her condominium before the marriage. Thus, contrary to plaintiff's argument, there was some evidence to support the contention that she had notice of defendant's alleged objectionable behavior before the marriage. Because of the conflicting testimony by the parties and witnesses, the issue of fault became a credibility contest, and this Court gives "special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo*, *supra* at 429. The trial court did not clearly err when it decided neither party was at fault.

Plaintiff next argues that the trial court's property distribution was unfair and inequitable because it wrongly considered certain property as defendant's separate property and because it failed to consider certain evidence. The distribution of marital property is governed by MCL 552.19, which provides

> [u]pon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money.

"The goal of a court when apportioning a marital estate is to equitably divide it in light of all the circumstances. The trial court need not achieve mathematical equality, but the trial court must clearly explain divergence from congruence." *Reed*, *supra* at 152 (citations omitted). The trial court must consider the following factors when dividing the marital property "wherever they are relevant to the circumstances of the particular case: (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). "The significance of each of these factors will vary from case to case, and each factor need not be given equal weight where the circumstances dictate otherwise." *Byington v Byington*, 224 Mich App 103, 115; 568 NW2d 141 (1997).[1]

When dividing marital property, the trial court must first determine which of the parties' assets are marital assets and which are separate assets. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). "Generally, assets earned by a spouse during the marriage are properly considered part of the marital estate and are subject to division, but the parties' separate

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[1] "Notwithstanding Michigan's no-fault divorce law, fault is still a consideration in the division of marital property." *Zecchin v Zecchin*, 149 Mich App 723, 727; 386 NW2d 652 (1986). However, where the trial court found that neither party was at fault, fault was properly not weighed in dividing the assets in this case.

assets may not be invaded." *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003). "When apportioning marital property, the court must strive for an equitable division of increases in marital assets 'that may have occurred between the *beginning* and the end of the marriage.'" *Reeves*, *supra* at 493, citing *Bone v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986) (emphasis in original). Separate assets may be invaded when one of two statutory exceptions are met. *Id.* at 494. Under MCL 552.23,[2] invasion of separate assets "is allowed when one party demonstrates additional need." And, invasion of separate assets is also allowed, under MCL 552.401,[3] when one party "significantly assists in the acquisition or growth" of the other party's separate asset, in which case "the court may consider the contribution as having a distinct value deserving of compensation." *Id.* at 494-495.

When distributing the marital property, the trial court considered all relevant factors and found that both parties were retired, both were awarded their separate retirement and IRA accounts, both have comfortable homes, both parties contributed to the marital estate (even though plaintiff's contributions were reduced by her spending habits), the parties treated much of their property as separate, plaintiff had medical issues that were treated with medication, defendant was in good health, neither party demonstrated a special need for additional funds and plaintiff has not demonstrated general principles of equity demand she be given more than half the estate. Thus, the trial court granted both parties a roughly equal share of the marital property and awarded each party their separate property.

First, plaintiff contends that the trial court's conclusion that the parties intended to keep their premarital assets as separate property was clearly erroneous because she testified at trial that she believed all of their property would be commingled. We disagree. A factual finding by

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[2] MCL 552.23(1) provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

[3] MCL 552.401(1) provides in relevant part:

> The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property . . .

a trial court is not clearly erroneous "if the trial court's view of the evidence is plausible . . ." *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). Despite what plaintiff may have believed in advance of the marriage, as noted by the trial court, over the course of their 20-year marriage the parties' actions indicated that their respective property was to remain separate. Both plaintiff and defendant testified that the proceeds from the sales of their respective rental properties were not commingled, that they had separate IRAs with named beneficiaries that were not the other party and that they both maintained separate bank accounts, except for a joint account to pay for marital expenses. Thus, the factual finding made by the trial court that the parties' actions demonstrated an intention on the part of both parties to keep their premarital assets separate was not clearly erroneous. *Id*.

Second, plaintiff asserts that the trial court failed to consider that the purchase of tax-free bonds with joint monies enabled defendant to avoid using his separate assets during the marriage. A review of the record reveals the trial court extensively considered the source of the parties' funds and how the parties utilized those funds. There is no evidence in the record to support plaintiff's claims that defendant used these joint funds in lieu of accessing his own funds. Plaintiff's argument is without merit.

Third, plaintiff contends the trial court erred by not granting her an additional $19,000 from a Merrill Lynch account because she contributed more to that account than defendant. Any of plaintiff's separate money added to the account lost its characteristic as separate property when it was commingled with defendant's money five years into a 20-year marriage. The $19,000 further lost its characteristic of separate property when the money in that account was commingled again with joint property during the marriage and with defendant's separate property to build the marital home. Because of the extensive commingling of this property, the money was not plaintiff's separate property. See *Pickering v Pickering*, 268 Mich App 1, 12-13; 706 NW2d 835 (2005) (holding that the commingling of the defendant's premarital cash with marital property rendered this separate asset as marital property).

Fourth, plaintiff argues that she is entitled to a portion of the proceeds from the sale of defendant's condominium because she contributed to the upkeep of the condominium and because the mortgage payments came from the parties' joint account. Plaintiff further contends that she is entitled to a portion of the motor home purchased with the money from the sale of defendant's condominium because the parties intended for the motor home to be used and enjoyed by both parties. The trial court categorized the proceeds from the sale of defendant's rental condominium as his separate property. This conclusion was not clearly erroneous. The proceeds from the sale were placed in a separate account and were never commingled with any marital funds as in *Pickering, supra*. Thus, the funds were properly considered defendant's separate property.

We note that, pursuant to MCL 552.401, the invasion of this separate property could occur if plaintiff "contributed to the acquisition, improvement, or accumulation of the property." In the present case, however, there is no evidence in the record to support plaintiff's claim that she contributed to the upkeep of defendant's rental property. Rather, the only testimony received about this property came from defendant, who testified that the property was self-sustaining and that marital funds were not used to pay for this property. There is nothing in the record to contradict this claim. Because there is no evidence that plaintiff assisted in the acquisition or improvement of the property, invasion was not appropriate. *Reeves, supra* at 494; MCL

522.401. As to the motor home, invasion of this property is also inappropriate. Though plaintiff argues the parties bought the motor home for the use and enjoyment of each party, plaintiff does not argue that she contributed in any manner to the acquisition or improvement of this property so as to warrant invasion pursuant to MCL 552.401. The trial court properly granted this property to defendant.

Fifth, plaintiff asserts that because she spent four days each year scrubbing defendant's sailboat, the speedboat that was purchased with the proceeds from the sale of that sailboat is marital property. Defendant's testimony at trial revealed that he owned the sailboat before the parties' marriage and, then, after the sale, he did not commingle the funds with any joint funds before he purchased the speedboat. This testimony went uncontested. Plaintiff makes no claim that she financially contributed to the purchase of the speedboat or that her efforts cleaning the boat once a year contributed to an improvement of the property as required to warrant an invasion pursuant to MCL 552.401. Thus, this property was not subject to invasion, and plaintiff is not entitled to any portion of the speedboat. MCL 552.401.

Sixth, plaintiff contends that she significantly contributed to the parties' motorcycle and that the trial court clearly erred when it determined the motorcycle was defendant's separate property. A review of the trial court's decision reveals that the motorcycle was actually considered to be marital property by the trial court. Plaintiff's argument is therefore meritless.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane M. Markey